United States Department of Labor
Employees' Compensation Appeals Board

STEVEN J. WHITLOCK, Appellant	)	
and	)	**Docket No. 04-1603**
	)	**Issued: January 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 8, 2004 appellant filed a timely appeal of a February 4, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs that affirmed the termination of his compensation benefits for refusal of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective May 19, 2002 on the basis that he refused an offer of suitable work.

FACTUAL HISTORY

On June 25, 1992 appellant, then a 30-year-old mail handler, sustained a traumatic injury to his low back when he lifted a mail sack. The Office initially denied appellant's claim, but in a December 20, 1993 decision, an Office hearing representative, found that appellant had presented sufficient factual evidence to establish that he sustained an injury on June 25, 1992.

The Office accepted appellant's claim for a low back strain and paid compensation for temporary total disability.

On September 29, 1999 appellant returned to work at the employing establishment, performing limited duty for four hours per day. He stopped work on October 15, 1999 worked on October 19 and 20, 1999 and again stopped work on October 21, 1999, filing a claim for a recurrence of disability, which the Office accepted.

On April 5, 2000 Dr. Murray Robinson, a Board-certified neurosurgeon, performed a bilateral L4-5 discectomy and fusion. This surgery was authorized by the Office on April 13, 1999.

On September 27, 2000 the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. Jonathan Bromberg, a Board-certified orthopedic surgeon, for a second opinion on his condition and his ability to work. In a November 1, 2000 report, he set forth appellant's history, complaints, and findings on physical examination, and reviewed the prior medical evidence including magnetic resonance imaging (MRI) scans and a surveillance videotape of appellant made from November 20, 1996 to February 5, 1997. Dr. Bromberg stated that appellant strained his lower back, that "there was never any clinical herniated lumbar disc that needed any particular surgical treatment," that the videotapes clearly showed that he was not suffering from a clinical herniated disc in 1996 and 1997, and that the April 5, 2000 surgery, if anything, made appellant worse and not better. He stated that there were "no objective abnormalities noted on his physical examination," that all the nerves from his lower back were functioning completely normally "as apparently has been the case all along through numerous examinations," and that appellant was capable of performing the job duties described by the employing establishment for four hours per day.[1] Dr. Bromberg concluded that appellant did not need any further treatment other than a home exercise program for his lower back and abdominals, and that he was "uncertain why he continues to have such severe, uncompromising pain."

In a January 27, 2001 report, Dr. Jerry Murphy, a specialist in emergency medicine, stated that he had reviewed Dr. Bromberg's report but did not concur with his opinion that appellant could return to light duty for four hours per day. Dr. Murphy's medical opinion was that appellant remained totally disabled and unable to work.

On May 10, 2001 the Office referred appellant, the case record and a statement of accepted facts, to Dr. William Simon, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on appellant's ability to work. In a June 8, 2001 review of appellant's medical records, he noted that appellant was only 30 years old in 1992 when he was found to have a degenerated and herniated L4-5 disc, and that the degeneration of this disc would have taken a number of years to develop before 1992, indicating that he had "a genetically

[1] The Office provided Dr. Bromberg with the employing establishment's offer dated June 7, 1999 to work in its rewrap section traying up unfaced reject letters, repairing torn letters, and date stamping letters that may be too thick to run through the cancellation machine. The physical requirements were working 4 hours, standing 2 hours, sitting up to 4 hours, walking 2 hours, twisting ½ hour, operating a motor vehicle 1 hour, climbing 1 hour, and pushing, pulling and lifting no more than 20 pounds.

programmed early onset of degenerative disc disease in the lumbar spine." Dr. Simon stated that the discrepancy between what appellant was able to do in the surveillance film and what he stated he could do when examined by a physician or when he went to restricted work in 1999 made it clear that in addition to an actual organic basis for low back pain (the degenerated disc and disc disease), there was an element of secondary gain. He noted that even after surgery appellant did not have a normal back and that in all likelihood this back condition caused some element of discomfort, and recommended a key functional assessment that would give a validity determination based on repetitive studies and pulse rates in these studies. Dr. Simon stated, "Assuming that this study turns out to be 'valid' this could be utilized to determine what his actual safe functional capabilities are."

Dr. Simon examined appellant on June 19, 2001 and in a report of that date, stated:

> "His physical examination is somewhat difficult to interpret. He has elements of lumbar muscle spasm. He has some mild elements of S1 nerve root irritation on the left heel. He has very slight atrophy of the right calf. However he does not have true sciatica on straight leg raising.
>
> "While the graft has not incorporated completely between L4 and L5, the metal construct between L4 and L5 is solid and therefore, would create a stable situation here, presumably decreasing any pain from the L4-5 disc.
>
> "He appears extremely psychologically disturbed by his limited function and his pain."
>
> * * *
>
> "At the present time I will be happy to review his new MRI [magnetic resonance imaging] [scan]. I will submit a report subsequent to receiving his Key functional assessment to determine how valid his responses are and if valid, what he is safely functionally able to do in a work situation."

A key functional assessment was performed June 27, 2001 by a physical therapist, who, in a July 2, 2001 report, stated it was identified as an "unknown representation of [appellant's] present physical capabilities based upon consistencies and inconsistencies when interfacing grip dynamometer graphing, resistance dynamometer graphing, pulse variations, weights achieved, and selectivity of pain reports and pain behaviors. A validity determination was unable to be made secondary to the patient not having completed all components of the [f]unctional [c]apacity [e]valuation (FCE)." The report continued that, based upon the weights achieved by appellant during the FCE, he was functioning safely within the guidelines for sedentary work for lifting and light work for pushing and pulling, and that these recommendations were based on a valid FCE. Appellant demonstrated limitations in bending, stooping, squatting, crawling, kneeling, balancing, stair negotiating, crouching, and repetitive foot movement, based on a valid FCE. Testing of appellant's capabilities of nearly all these components was terminated due to his complaints of pain. With regard to workday tolerance recommendations, the report indicated that appellant could sit four to six hours with regular breaks, and walk one to three hours for occasional, short distances. Appellant did not complete the standing component.

In a July 12, 2001 report, Dr. Simon reviewed the functional assessment, noting that no determination was made as to appellant's workday tolerance in hours. Dr. Simon concluded:

> "A review of this functional evaluation indicates that no validity determination could be made because the patient did not complete the test. Therefore, the only thing we know is that this patient can sit for four [to] five hours. That is, he could complete a half day of sedentary work. This would require him not lift over 12.6 pounds and not to have to use his feet frequently."

On January 15, 2002 the employing establishment offered appellant a limited-duty position repairing ripped and torn mail, date stamping letters too large for the machine, working four hours per day with no lifting more than 10 pounds and the capability of changing position as needed. The employing establishment sent this offer to one of appellant's attending physicians, Dr. Steven M. Rosen, a Board-certified anesthesiologist and specialist in pain medicine, who stated that he concurred that appellant was capable of returning to work in this position.

By letter dated February 28, 2002, the Office advised appellant that it had found the offered position suitable, and that section 8106(c) of the Federal Employees' Compensation Act provides that an employee who refuses an offer of suitable work is not entitled to any further compensation. The Office afforded appellant 30 days to accept the offer or provide reasons for refusing it. On March 28, 2002 appellant submitted a March 26, 2002 report from Dr. Murphy, contending that it showed that he could not return to the work offered to him. Dr. Murphy opined that, with a reasonable degree of medical certainty, appellant was unable to accept this job and remained totally disabled, on the basis that he continued to complain of significant and debilitating lower back pain requiring narcotic medication that tended to affect his level of concentration and make him drowsy and sleepy. Dr. Murphy also stated that appellant was "unable to sit, stand, walk, bend, crawl, climb for more than 10 or 15 minutes at a time without increase discomfort in his lower back region." Dr. Murphy diagnosed herniated lumbar disc with chronic pain and chronic radiculopathy, chronic low back syndrome, status post lumbar laminectomy, and failed surgical back syndrome, and opined with a reasonable degree of medical certainty that these diagnoses were directly related to his June 25, 1992 employment injury.

By letter dated April 5, 2002, the Office found that the reasons given for refusing the position were unacceptable. The Office allotted appellant 15 days to accept the position, after which it would proceed to a final decision.

By decision dated May 2, 2002, the Office terminated appellant's compensation effective May 19, 2002 for refusing an offer of suitable work.

On May 31, 2002 appellant requested a hearing before an Office hearing representative, which was held on October 27, 2003. Appellant testified that the position offered in January 2002 was the same position he had unsuccessfully attempted in perform in October 1999. Appellant submitted a June 3, 2003 report from Sherri Landes, Ph.D., a clinical psychologist, who stated that appellant's depression was caused by his June 25, 1992 employment injury, in that it "stemmed from his physical pain and the fact that he saw very little chance of the pain improving. … The depression causes extreme reduction in motivation, as

well as sleep disturbance, a 25-pound weight loss and social withdrawal." Dr. Landes noted that appellant reported no history of depression prior to his work injury, and that there were no outside stressors which could be responsible for his depression. In a November 4, 2003 report, Dr. Landes stated, "It is my opinion, to a reasonable degree of psychological certainty, that [appellant] is totally disabled from a psychological standpoint due to severe depression and chronic pain related to his work injury of June 25, 1992."

By decision dated February 4, 2004, an Office hearing representative found that the Office met its burden of proof to terminate appellant's compensation, as the medical evidence at the time of the decision to terminate compensation supported his ability to perform the limited-duty position offered by the employing establishment. The Office hearing representative noted that medical evidence indicating that appellant was totally psychologically disabled was not submitted until a year later, and that there was no indication that Dr. Landes reviewed the position description.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[3]

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] To justify termination of compensation, the Office must establish that the work offered was suitable.[5] Section 10.516 of the Code of Federal Regulations[6] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[7]

---

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

[4] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[5] *David P. Camacho*, 40 ECAB 267 (1988).

[6] 20 C.F.R. § 10.516

[7] *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

ANALYSIS

Following appellant's authorized L4-5 discectomy with fusion on April 5, 2000, a conflict of medical opinion arose on the issue of appellant's ability to work. Dr. Bromberg, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, concluded in a November 1, 2000 report that appellant was capable of performing the limited duty described by the employing establishment for four hours per day. In a January 27, 2001 report, one of appellant's attending physicians, Dr. Murphy, a specialist in emergency medicine, expressly disagreed with Dr. Bromberg's opinion that appellant could perform light duty for four hours per day, and stated that appellant remained totally disabled.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Act,[8] referred appellant, the case record and a statement of accepted facts to Dr. Simon, a Board-certified orthopedic surgeon. In his initial report, dated June 8, 2001, Dr. Simon reviewed the case file and stated it showed an actual organic basis for low back pain and an element of secondary gain. Dr. Simon recommended a functional capacity assessment, and stated that, if it was valid, it could be utilized to determine appellant's actual safe functional capabilities. This assessment was performed on June 27, 2001 by a physical therapist, who stated that a validity determination could not be made secondary to appellant not having completed all the components of the functional capacity evaluation. Upon review of this report, the only component that is listed as having not been completed by appellant is the amount of standing he was capable of doing. As noted by Dr. Simon in his review of the functional assessment, it does indicate that appellant could sit for four to five hours, which Dr. Simon interpreted as showing that appellant could complete a half day of sedentary work. The functional assessment indicated that the limitation to sedentary work for lifting was based on a valid evaluation.

The position offered to appellant by the employing establishment was sedentary, with no lifting more than 10 pounds, and was offered for four hours per day. The position complied with the restrictions described by Dr. Simon, the impartial medical specialist, and the Office properly found that it was suitable. The Office then complied with the procedural requirements by notifying appellant of its finding of suitability and of the penalty provision of 8106(c) of the Act, and by giving him 30 days to accept the position or provide reasons for refusing it. Appellant responded that he could not perform the offered position, and submitted a March 26, 2002 report from Dr. Murphy in support of this contention. However, as the report of a physician on one side of a conflict of medical opinion resolved by an impartial medical specialist, this report from Dr. Murphy is insufficient to overcome the weight of Dr. Simon's report or to create a new conflict of medical opinion.[9]

The Office properly advised appellant in an April 5, 2002 letter that his reasons for refusing the position were unacceptable, and that he had 15 days to accept the position. Appellant did not do so, and the Office properly terminated his compensation.

---

[8] 5 U.S.C. § 8123(a) states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[9] *William Morris*, 52 ECAB 400 (2001).

After the termination, appellant submitted medical reports from Dr. Landes, a clinical psychologist, indicating that he was totally disabled due to depression stemming from the physical pain from his employment injury. However, the earlier of Dr. Landes' reports was dated over one year after the Office terminated appellant's compensation, and neither of her reports indicate that appellant was totally disabled by a psychological condition at the time he refused the employing establishment's offer of limited duty.[10] These reports thus do not show that the work appellant refused was not suitable.

CONCLUSION

The Office properly terminated appellant's compensation effective May 19, 2002 on the basis that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] The reports from Dr. Landes lend more support to a claim for a recurrence of disability due to a consequential condition, but this issue was not adjudicated by the Office.